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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 927

UNITED STATES OF AMERICA,
Petitioner,

v.

RAYMOND SAULNIER.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Respondent is satisfied with Petitioner's presentation respecting the citation of the opinion below, the jurisdiction of this Court and the statutes involved.

Question Presented[1]

GENERAL STATEMENT: Should this Court review by way of Certiorari a Court of Claims decision in a patent case of the type normally considered by that Court, where such

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[1] The statement of the "Question Presented" which appears in the Petition is inaccurate. The Court of Claims said:

> "A canopy that would slide back and forth even when in flight was old; a detachable canopy was old. But a canopy which was slidable back and forth *and completely and instantaneously detachable was new.*" (Petition, p. 18, emphasis supplied.)

Attention is directed also to page 16 of the Petition, where the Court held that "taking everything into consideration * * * the combination was not obvious" to those of ordinary skill in the art, and stated:

> "We start with the fact that the result obtained by Plaintiff *had been sought* ever since they started putting canopies over aircraft fighter planes, *without success.*" * * *
> "Plaintiff invented such a canopy—something no one else *had been able to do.*" (Petition, page 16, emphasis supplied.)

decision was rendered after full consideration of all the evidence having a bearing on the invention covered by particular combination patent claims and application thereto of the established standards of invention, and where such decision is clearly consistent with previous decisions of the Court of Claims and the Supreme Court?

SPECIFIC STATEMENT: Was the Court of Claims in error in sustaining the validity of a patent covering a new combination of elements where: (1) the combination provides a safety device, and achieves at least one critical function not previously satisfactorily performed; (2) the combination consists of at least three broad means coacting in non-interfering relationship, and at least two of such means include several complex mechanically cooperating sub-combinations; (3) the combination achieves a new and improved result which had long been sought, without success; (4) the combination was not operably developed by large recognized manufacturers in the field working on the problem and familiar with the prior art; (5) the combination represents a significant military advance in that it is an improvement which makes the difference between life and death for pilots of fighter planes; (6) the patented combination and not the combined prior art was adopted by Petitioner in almost the exact form shown in the patent drawings, and the basic teachings of the patent and the basic combination have been continuously utilized by the Petitioner and others even in this age of rapid scientific development; (7) the combination was recognized as a meritorious contribution to scientific progress by the British Government, and by the French Government acting with Petitioner's aid and approval under the Blum-Byrnes agreements; (8) the combination was considered patentable by the Patent Office experts after reviewing the pertinent prior art developments; and (9) the patent issuing on the new combination changed the whole complexion of the patent art, in that prior to the Patentee's filing date no patent disclosed the combination, but after issuance of the patent, applications were filed and patents were issued on improvements in the combination.

Statement

Respondent brought suit aganst the United States in the Court of Claims under 28 U. S. C. §§ 1491 and 1498 and Title 35 U. S. C. to recover damages for infringement of his United States Letters Patent No. 2,125,752 issued August 2, 1935 (Petition, p. 20, Finding 1). The patent describes, and the claims thereof define, the first operative non-interfering combination of elements acting together, to provide an aircraft roof or "canopy" which a pilot can easily move back and forth to any position over an aircraft cockpit while in flight, and which the pilot can instantaneously disconnect from the fuselage in an emergency regardless of the position to which it has been moved (Petition, pp. 15-16).

Basically, the Respondent's "safety device" combination consists of a roof normally slidable above a fighter plane cockpit, a mechanism for slidably mounting the roof above the cockpit so that it can be moved when in flight to any desired position over the cockpit, a mechanical advantage "drive" means operative from inside the cockpit and cooperating with the sliding mechanism for displacing the roof without interfering with detachment, detaching devices instantaneously operable to detach the roof from the mechanism slidably mounting the roof, without interfering with the sliding mechanism or mechanical advantage "drive", and means operative from inside the cockpit which do not interfere with the sliding mechanism or the mechanical advantage drive, but serve to simultaneously operate the detaching devices to instantaneously detach the roof in the event of an emergency (Petition, p. 24—Claim 1).

The United States raised the defense that the patent was invalid over the prior art (Petition, p. 5), and the trial Commissioner's decision, based on a conjectural interpretation of the prior art contrary to the evidence, held the claims invalid (Petition, pp. 5, 45, Finding 23).

The Court of Claims, upon reviewing the evidence and the asserted basis of the Commissioner's conclusion, realized the conjectural nature thereof as well as the need for infallibility in performance required of the patented combination, and overruled the decision of the Commissioner, stating in part:

> " . . . It may be as the Commissioner suggests, that the wind would tear these two halves off the airplane. This seems to us uncertain, but, if it would, would it do it immediately, before the pilot attempted to escape from the cockpit? Maybe so; maybe not . . .
>
> "As much as we respect the opinion of our learned and able Commissioner, we cannot agree with him that this patent anticipates plaintiff's patent. Plaintiff's patent is a decided improvement over this British patent, an improvement that might make the difference between life and death to the pilot seeking to escape . . ." (Petition, pp. 17-18).

The Court, in addition to the above, took into consideration other cumulative facts established by the evidence and peculiar to this particular case (Petition, p. 16); namely, (1) "the fact that the result obtained by Plaintiff had been sought ever since they started puting canopies over the cockpits of fighter planes, without success" (Petition, p. 16); (2) the fact that no one, including large and recognized aircraft manufacturers working on the problem and familiar with the prior art, had invented a canopy that "was both susceptible of being slid back and forth and also of being completely detached when desired", and that plaintiff did "something NO ONE ELSE HAD BEEN ABLE TO Do" (Petition, p. 16, emphasis supplied); (3) the fact that no prior art patent disclosed a combination as defined by Plaintiff, or achieved the new and useful result he obtained, (Petition, pp. 16-18); (4) the fact that the British and French Governments compensated Plaintiff for utilizing his invention (Petition, p. 18); (5) the fact that although some prior art devices functioned to provide slidable canopies, and other prior art devices functioned to provide detachable roof sections, the Plaintiff's specific

combination functioned to provide not only sliding and detaching, but instantaneous release—the critical factor (Petition, pp. 17, 18)[2]; and (6) the fact that the claims were allowed by the Patent Office experts pursuant to their finding that the invention as defined in the claims was patentable and after reviewing, and with knowledge of, the pertinent prior art developments (Petition, pp. 18-19).

It was the unanimous decision of the United States Court of Claims (Petition, p. 19), after full consideration of all of the evidentiary factors set forth above as well as all of the arguments advanced by the Government, that Respondent had contributed, through his efforts and ingenuity, a significant advancement in a crucial field of scientific endeavor and was therefore entitled to just compensation (Petition, pp. 18-19).

Reasons for Denying the Writ of Certiorari

(A) General Reason:

The Court of Claims, having considered all the evidence presented, *rejected defendant's normal argument* in cases of this type, finding that the combination defined in the claims involves more than merely joining known elements and would *not* have been obvious to a mechanic of ordinary skill in the art, *and held the patent claims valid.*

The Court of Claims is often called upon to decide a patent case, such as the subject case, wherein combination patent claims are involved. In some cases they have found combination patent claims valid: *Badowski* v. *U. S.*, 140 F. Supp. 544 (1956); *Zonolite* v. *U. S.*, 149 F. Supp. 953 (1957). In others, they have found the combination patent claims invalid: *Alma Motor Co.* v. *U. S.*, 134 F. Supp. 659 (1955); *Bullock et al.* v. *U. S.*, 176 F. Supp. 279 (1959). In still others, they have found some combination claims

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[2] "In Plaintiff's device there is no possibility of the canopy's interfering with the pilot's escape, because the whole thing is immediately blown away." (Petition, p. 18.)

of a patent valid, and other combination claims of the same patent invalid, *Alma v. U. S.*, 134 F. Supp. 641 (1955). Accordingly, it is unreasonable to presume, as Petitioner contends, that a Court as experienced as the Court of Claims in matters of this kind has departed in this case from established law and lowered the accepted standard of invention.

(B) Specific Reasons for Denying the Writ:

It is submitted that review on Certiorari is also unwarranted because:

(1) This case, like all other cases involving combination patent claims considered by the Court of Claims in its regular course of business, involves only the usual general issues of validity and infringement of the claims, and the usual specific issues regarding the interpretation to be given particular prior art patents alleged to be anticipations, the manner in which established principles of patent law are to be applied to the particular facts proved, and the sufficiency of the alleged infringer's evidence to overcome the presumption of validity attached to a patent.

(2) The decision below (a) was rendered by an experienced court completely familiar with the applicable law; (b) is in conformity with all statutes, decisions, and tests or rules heretofore set down by this Court, as well as the Court of Claims; and (c) does not in fact in any way reflect a change in the standard of invention heretofore established.

(3) The decision is necessarily of limited scope and is not of general application because it is based on certain evidentiary factors peculiar to the invention under consideration, all of which evidentiary factors are not likely to surround another invention.

Rejection of Usual Defense

In almost all cases involving combination patent claims which the Court of Claims has been called upon to decide, the defense that the combination only involves joining known elements in an obvious way has been raised. See *Alma Motor Co.* v. *U. S.*, 134 F. Supp. 641 (1955); *Badowski* v. *U. S.*, 140 F. Supp. 544 (1956); *Zonolite* v. *U. S.*, 149 F. Supp. 953 (1957); *Bullock* v. *U. S.*, 176 F. Supp. 279 (1959).

Notwithstanding the Petitioner's repeated assertions of this usual defense below and its present assertions to this Court, neither the Commissioner nor the Court ever accepted Petitioner's arguments that the Patentee's invention was a combination of *two old devices* (Petition, pp. 18, 36-37, 46-49) and that the combination included devices which do not cooperate or coact[3]. The Commissioner found the combination to include at least three elements (Petition, p. 45, Finding 23), and the Court, after careful deliberation, appears to have agreed (Petition, pp. 36-37, Findings 23-28). Even the Commissioner's findings which were favorable to the Petitioner required combining at least three mechanisms allegedly suggested by four different prior art patents in order to anticipate the claims in suit (Petition, pp. 45, 46, Finding 23). Moreover, neither the Court nor the Commissioner held the evidence to establish that the combined prior art structures produced the desired result[4]. Instead, the Court found the *evidence clearly shows that the*

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[3] The Petitioner apparently attempts to misconstrue a statement made by the Court to the effect that the overall sliding mechanism "did not act conjointly" with the overall detaching mechanism so as to make it appear that no coaction or cooperation is required between component parts of the subject invention; actually the Court, as is apparent from the context, was merely setting forth the obvious fact that a pilot would not slide the canopy "at the same time" he jettisoned it. (Petition, p. 16.)

[4] The Commissioner's decision cites no evidence supporting such a conclusion.

prior art did not teach how to make a satisfactory combination, and that Petitioner did not operate under combined prior art, but had made "long continued use of [the patented combination]" (Petition, p. 18). Thus, the Court of Claims did *not* hold a combination of *two* old devices which combined produce no new or improved result to be patentable, but instead, they *rejected* Petitioner's repeated arguments that no new result was produced, stating in summary:

> "A canopy that would slide back and forth, even in flight, was old; a detachable canopy was old. But a canopy that was both slidable back and forth and completely *and instantaneously detachable was new.* There can be no doubt that such a canopy was useful. Defendant's long continued use of it, to the exclusion of all others, is eloquent testimony of that fact." (Emphasis supplied.) (Petition, p. 18.)
>
> "The burden is on the infringer to show that the patent was improvidently granted. . . . We do not think defendant has carried that burden." (Petition, p. 19).

Case Involves Usual Issues

The fact that the present case involves only the usual issues of a patent infringement action as set forth in specific reason (1) above is apparent from a brief review of the decision.

Conformity of decision below with applicable law familiar to the Court of Claims

The Supreme Court has long recognized the fact that patent claims, such as those under consideration below, directed to a new combination providing a new and useful result are valid, even though individual parts of the combination are old, provided, of course, the combination, as here, was not obvious from prior art disclosures, at the time the invention was made, to mechanics of ordinary skill

in the art. *Diamond Rubber Co.* v. *Consolidated Rubber Tire Co.*, 220 US 428, 443 (1911); *Keystone Mfg. Co.* v. *Adams*, 151 US 139 (1894); 35 U. S. C. §§ 102 and 103.

This Court has also long recognized that any one of the following evidentiary factors, *all of which were found present in the instant case*, may support patentability and negative obviousness; (a) the fact that the invention accomplishes a result not theretofore attained, and is of practical utility.[5] *Richmond Screw Anchor Co.* v. *U. S.*, 275 US 331, 339, 72 L. ed. 303 (1928); *Diamond Rubber Co.* v. *Consolidated Rubber Tire Co.*, 220 US 428, 434, 55 L. ed. 527 (1911); (b) the fact that the invention is of increased effectiveness over prior art devices, and has been recognized, without business exploitation, by the principal users thereof.[6] *Cantrell et al.* vs. *Wallick*, 117 US 689, 694, 29 L. ed. 1017, 1018 (1886); *Minerals Separation Ltd.* v. *Hyde*, 242 US 261, 270, 61 L. ed. 286, 293, (1916); (c) the fact that the patent has been recognized as valid by parties interested in denying its validity.[7] *New Process Fermentation Co.* v. *Maus*, 122 US 413, 30 L. ed. 1193 (1887); (d) the fact that the Patentee was successful in producing an improvement which was not satisfactorily or operatively produced by recognized skilled persons prior to the patentee's development and familiar with the prior art.[8] *Goodyear Tire & Rubber Co., Inc.* v. *Ray-O-Vac Co.*, 321 US 275, 279, 64 S. Ct. 593, 88 L. ed. 721 (1944); and (e) the fact that the invention satisfied a long existing want which remained unsatisfied by prior art developments.[9] *Eibel Process Co.* v. *Minnesota, etc. Paper Co.*, 261 US 45, 67, 68 L. ed. 523 (1923).

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(5) See Petition, pp. 16, 18.

(6) See Petition, pp. 17, 18.

(7) See Petition, p. 18.

(8) See Petition, p. 16. The Court here took into consideration the fact that Curtiss-Wright, owner of some of the alleged anticipating prior art patents, and Douglas aircraft had not developed an operative assembly including the elements recited in Plaintiff's specific combination. (Petition, pp. 34, 35, Findings 20 and 21.)

(9) See Petition, pp. 16-18.

The Court below found that the combination which is the subject of the instant controversy was at the time of the invention unquestionably new, and that it still is being used (Petition, p. 18). After due consideration of all of the evidence presented by the parties, the Court also found *all* of the aforestated considerations to be *fully satisfied* by Respondent's invention (Petition, pp. 16-19).

The Respondent, as the Court stated, did something "No One Else Was Previously Able To Do" (Petition, p. 16, emphasis supplied). He provided a new combination of elements—a combination which made the canopy not only slidable, but in addition completely and Instantaneously Detachable (Petition, p. 18). To use the Court's own words, he provided an "Improvement That Might Make The Difference Between Life and Death to a pilot seeking to escape" from an airplane (Petition, p. 18, emphasis supplied). *A fortiori* this is a significant advance in the useful sciences and a *proper subject of a patent.*

The Court of Claims decision cannot be interpreted as suggesting that the Patentee merely put together two old devices because, as clearly set forth in the decision, the Patentee combined a plurality of mechanical elements to make a canopy in which, for the first time, all the essential functions were combined—the canopy being slidable and detachable and capable of complete and instantaneous release.[10] The decision on which Petitioner heavily relies, namely, the famous *A & P Case*, 340 U. S. 147 (1950), recognizes patentability under such circumstances, and the decision below is clearly in complete conformity with that case; the Respondent's patent certainly does *not* withdraw "what already is known into the field of its monopoly" but, *on the contrary*, has "added * * * to the total stock of knowledge" and has given skillful men a new resource of

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[10] "But no one had invented a canopy that was both susceptible of being slid back and forth and also of being completely detached when desired. Plaintiff invented such a canopy—something no one else had been able to do." (Petition, p. 16.)

which they quickly made use. (See the patents on modifications of Respondent's invention which *followed his disclosure*, as exemplified in Respondent's Exhibit 11, R. 248).

Limited scope of application of decision

Although it is clear from the foregoing discussion that there is no basis for review by the United States Supreme Court of the decision below, the Court's attention is also directed to the minor significance and limited applicability of the decision.

The cumulative set of facts established by the evidence in the instant case is of limited application because it supports a determination that the subject safety device combination used on fighter planes is patentable when every statutory and case law consideration is applied thereto[11]. The Court found not only that the prior art did not anticipate the combination, but in addition, found that a total of *six factors*, previously determined by this Court to be proper for consideration[12], *plus* the failure of the prior art *to anticipate* the invention[13], *supported* a finding of *patentability*. It is unusual that the validity of a patent can be based so firmly on a multiplicity of factors.

In view of the factual situation presented by the instant case, the decision below cannot in any way be interpreted as having "far-reaching effects" applicable to an alleged multitude of claims presently pending with Petitioner. Such claims are not likely to involve situations where a safety device combination used on fighter planes is surrounded by the circumstances involved herein. Petitioner's basis for Certiorari, namely, the pendency of a large number of claims, is without merit in the instant

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(11) See page 9, and footnotes 5-9 inclusive, *supra*.

(12) Ibid.

(13) See Petition, pp. 17-18.

situation because there is no showing or even assertion that the fact situations surrounding the pending claims are analogous to that at hand.

Conclusion

For the foregoing reasons, it is respectfully requested that the petition for Writ of Certiorari be denied.

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